

INDEX

	Page
Opinions below.....	1
Jurisdiction.....	1
Question presented.....	2
Statutes involved.....	2
Statement.....	2
Argument.....	11
Conclusion.....	16

CITATIONS

Cases:

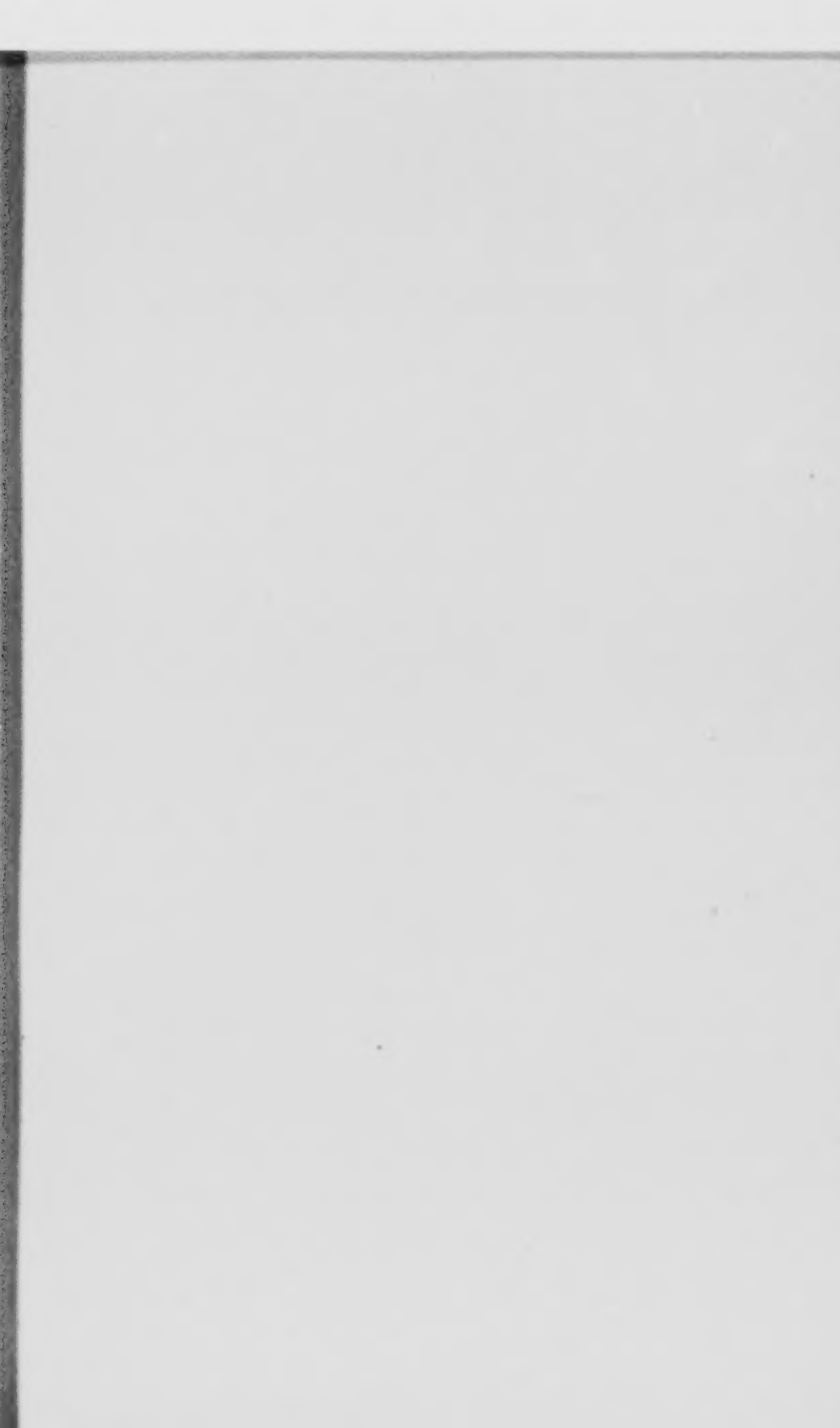
<i>Armstrong v. Commissioner</i> , 143 F. 2d 700.....	15
<i>Commissioner v. Branch</i> , 114 F. 2d 985.....	15
<i>Commissioner v. Brown</i> , 122 F. 2d 800, 131 F. 2d 640, certiorari denied, 318 U. S. 767.....	12, 14
<i>Commissioner v. Buck</i> , 120 F. 2d 775.....	12, 14, 16
<i>Commissioner v. Katz</i> , 139 F. 2d 107.....	15
<i>Dobson v. Commissioner</i> , 320 U. S. 489, rehearing denied, 321 U. S. 231.....	15
<i>Downie v. Commissioner</i> , 133 F. 2d 899.....	12
<i>Foerderer v. Commissioner</i> , 141 F. 2d 53.....	12
<i>Helvering v. Clifford</i> , 309 U. S. 331.....	11, 16
<i>Helvering v. Horst</i> , 311 U. S. 112.....	16
<i>Helvering v. Stuart</i> , 317 U. S. 154.....	11, 13
<i>Phipps v. Commissioner</i> , 137 F. 2d 141.....	15
<i>Pimpton v. Commissioner</i> , 135 F. 2d 482.....	15
<i>Rands v. Commissioner</i> , 34 B. T. A. 1107, dismissed, 101 F. 2d 1018.....	14
<i>White v. Higgins</i> , 116 F. 2d 312.....	12
<i>Williamson v. Commissioner</i> , 132 F. 2d 489.....	12

Statutes:

Revenue Act of 1934, c. 277, 48 Stat. 680, Sec. 22.....	2
Revenue Act of 1936, c. 690, 49 Stat. 1648, Sec. 22.....	2
Revenue Act of 1943, sec. 134.....	12

Miscellaneous:

H. Rep. No. 871, 78th Cong., 1st sess., p. 51.....	12
S. Rep. No. 627, 78th Cong., 1st sess., pp. 68-69.....	12



In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 722

ESTATE OF J. B. WEIL, DECEASED; MRS. PAULINE
P. WEIL, E. J. STERN, AND M. E. KILPATRICK,
EXECUTORS, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH
CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings of fact and opinion of the Tax Court (R. 31-54) are not reported. The *per curiam* opinion of the Circuit Court of Appeals (R. 415) is not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on October 18, 1944. (R. 415.) The petition for a writ of certiorari was filed on De-

cember 2, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the courts below have properly held that the income from a trust created by the taxpayer for his minor daughter is taxable to him for the years 1934-1937 under Section 22 (a) of the Revenue Acts of 1934 and 1936.

STATUTES INVOLVED

Revenue Act of 1934, c. 277, 48 Stat. 680:

SEC. 22. GROSS INCOME.

(a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; * * *

* * * * *

Section 22 (a) of the Revenue Act of 1936, c. 690, 49 Stat. 1648, is the same as Section 22 (a) of the 1934 Act.

STATEMENT

The facts as found by the Tax Court may be summarized as follows:

The taxpayer¹ and his wife, Pauline Plonsky Weil, owned all the outstanding stock of the Coca Cola Bottling Works of Nashville, consisting of 100 shares; 59 of these shares were in the name of Mrs. Weil and 41 in the name of the decedent. Mrs. Weil had acquired her shares from her husband over a period of years. (R. 32.)

On December 24, 1934, the decedent executed a statement purporting to transfer certain shares of the Bottling Works stock in trust for his daughter. Another statement purporting to modify the first statement was executed by the decedent on December 31, 1935. Neither of these statements was witnessed or sworn to. (R. 35.) The provisions of the first statement are as follows (R. 35-38):

KNOW ALL MEN BY THESE PRESENTS, That the Undersigned, JULIUS B. WEIL, hereinafter referred to as grantor, for and in consideration of natural love and affection does hereby sell, assign, transfer and convey unto said JULIUS B. WEIL as trustee for the use of the beneficiaries herein named, eight (8) shares of the common stock of Coca-Cola Bottling Works, a Tennessee corporation, to have and to hold said stock as trustee forever, in fee simple, for

¹ The taxpayer having died during the pendency of the proceeding in the Tax Court, his executors were substituted for him. (R. 2.) He is referred to hereinafter as the decedent.

the uses and purposes, however, hereinafter set forth.

1. It is intended that this transfer and conveyance is a gift by the said grantor, and is irrevocable, the purpose of the appointment of grantor as trustee being to hold the legal title to said stock and to invest the income and principal thereof for the benefit of the cestuis que trustent as herein provided. In so far as concerns the gift herein made to grantor's daughter, Pauline Weil, the same is intended to provide, to the extent made possible by said gift, for the care, maintenance, support and education of said beneficiary during her minority, in lieu of the furnishing to her by grantor directly of such care, maintenance, support and education as required of grantor by law.

2. Grantor has simultaneously with the execution of this instrument transferred the certificate evidencing said eight (8) shares in writing to trustee and this gift and trust shall become immediately effective upon the execution of this instrument, and the trustee having accepted the terms of the trust agrees to have said stock registered on the books of the Coca-Cola Bottling Works in accordance with said transfer and to deliver a copy of this trust agreement to Coca-Cola Bottling Works.

3. The trustee shall hold the legal title to said stock in trust for the cestuis que trustent herein named, as follows:

The income arising from said corpus during the life of Pauline Weil (grantor's daughter) shall become the property of and be held for the benefit of said Pauline Weil as herein provided. Upon the death of Pauline Weil, the corpus herein set up shall become the property of and be distributed equally among the natural children of said Pauline Weil, living at her death, upon their reaching the age of twenty-one (21), provided, however, if said Pauline Weil die leaving no natural living children, the entire corpus shall then become the property of grantor's present wife, Pauline Plonsky Weil, or if she be then dead, the corpus shall become the property of any religious or charitable organization to be selected by the then acting trustee hereunder, unless grantor be the trustee at said time, in which event the selection shall be made by Harold Hirsch of Atlanta, Georgia, if living, otherwise by E. J. Stern, if living, otherwise by the Court having jurisdiction of trust estates in Davidson County, Tennessee.

4. Should the trustee die or become incompetent or unable for any reason to continue as trustee hereunder, the successor trustee shall be Mrs. J. B. Weil, wife of the trustee herein named, and if she be dead or for any reason unable to or refuse to accept the trust, Harold Hirsch of Atlanta, Georgia, shall name a trustee, and if he be dead or unable for any reason to make

such appointment, the same and all subsequent appointments shall be made by the court having jurisdiction of trust estates in Davidson County, Tennessee.

5. The trustee herein appointed and any successor trustee shall have the right and power to (a) vote said stock at all meetings of the stockholders; (b) to exchange or sell said stock at public or private sale, without notice or court order of any kind in connection with any merger, consolidation or other corporate reorganization of any kind whatsoever affecting said company or any successor thereof; (c) to collect all dividends of every nature whatsoever and to invest and reinvest said funds or other income as in the sole discretion of the trustee is advisable and is to the best interest of the cestuis que trustent, and in so investing and reinvesting, the trustee shall not be limited to investments authorized by the laws of the State of Tennessee or of any other state for investment by trustees, but shall invest in any stock, bond, or other security, real estate or other property of whatever nature as is deemed advisable by the trustee.

6. Stock dividends shall remain a part of the corpus of this trust.

The trustee shall also have the following powers, namely:

7. To borrow on said stock for the benefit of the cestuis que trustent and to pledge said stock or any part thereof, or said

corpus if the form thereof be changed as herein provided, as collateral on loans whenever in the discretion of the trustee it is to the best interest of the cestuis que trustent;

8. To sell said stock for the benefit of the cestuis que trustent at public or private sale without notice and without any order of court, at any time when such sale of said stock or any part thereof is to the best interest of the cestuis que trustent, and to invest and reinvest the corpus as in the discretion of the trustee is deemed best, the trust being authorized to invest such corpus and reinvest it in any property or security of any nature whatsoever whether or not authorized under the laws of the State of Tennessee or of any other state.

9. Notwithstanding the power herein given to the trustee to invest and reinvest the income and the corpus, the trustee is authorized to use such portion of the income and principal as is necessary for the support and maintenance, including education, of PAULINE WEIL (grantor's daughter), and of the natural children of PAULINE WEIL if she die leaving such children; the trustee to be the sole judge as to the amounts to be so expended, all income arising from the corpus during the life of PAULINE WEIL over and above the amount of income used for the support, education and maintenance of PAULINE WEIL to be the sole property of PAULINE WEIL and to

be delivered to her upon her reaching the age of thirty (30) years.

10. The powers given to the trustee herein appointed shall extend to all successor trustees hereunder and the trustee herein named and all successor trustees are relieved from giving any bond of any nature whatsoever now or hereafter required of trustee under the laws of the State of Tennessee or of any other state, from taking any orders of court as a condition precedent to the execution of any power given, or from making any reports, inventories, or returns of any nature whatsoever now or hereafter required under the laws of any state.

The provisions of the second statement are as follows (R. 39):

WHEREAS, on the twenty-fourth day of December, 1934, the undersigned did execute a trust to himself as trustee for eight (8) shares of common stock of COCA-COLA BOTTLING WORKS, a Tennessee Corporation; and

WHEREAS, it is the desire of all parties concerned to amend said trust, the said trust, with the consent of all parties, is hereto [sic] amended, as follows:

Under paragraph 9, the trustee is no longer authorized to use any portion of the income and principal to perform any legal obligation that I, the grantor, as father of the cestuis que trustent **PAULINE WEIL**, am obligated to perform, and the trust is there-

fore amended by eliminating that portion of paragraph 9 which provides that the trustee is authorized to use such portion of the income and principal as is necessary for the support and maintenance, including education, of PAULINE WEIL, it being the intention and purpose of this amendment to eliminate the use of either income or principal for the performance of any legal duty that I owe my daughter, PAULINE WEIL, the cestuis que trustent hereunder.

On the same day that the decedent created his trust, his wife created a similar trust in 25 shares of the Bottling Works stock for their daughter. (R. 40.) This trust, however, was not amended as decedent's was on December 31, 1935. (R. 51.) The Tax Court's decision with respect to it is not involved in these review proceedings.

During the taxable years involved the trust instruments here in question were kept in a safety deposit box in the name of J. B. Weil, trustee. During part of the time after the creation of the trusts this box also contained securities and documents which were the individual property of the decedent and his wife. At a later time, undisclosed by the record, these were removed. (R. 40.)

A trust account was set up on the books of the Bottling Works in the latter part of 1934 by the bookkeeper who at the time had not seen the "trust instrument". He did not know exactly what the trust account was, understanding only

that there was a trust for the daughter of the Weils. Until an audit was made in 1937 the only record of the trust income was on the books of the Bottling Works, and personal accounts of the decedent and his wife also appeared on the same books. The decedent gave no instructions to the bookkeeper as to the trust account, but since the bookkeeper had heard of the trusts for the daughter he opened such an account on the Bottling Works' books and made various entries therein in the years 1934 to 1937, but these entries represented only his notion of what should be entered into the trust account. At times some of the individual expenses of both the decedent and his wife were charged to this account. (R. 40-41.)

The decedent had a long-established practice of handling his own financial matters through the Bottling Works. (R. 42.) In 1935 the decedent became ill in Europe. He returned in the fall of that year, was stricken with paralysis in January 1936, and probably some time later in that year instructed the bookkeeper that the living expense entries had been improperly made in the trust account. On January 2, 1936, the decedent had withdrawn by check signed "Pauline Weil, by J. B. Weil" the entire amount of a savings account in the name of Pauline Weil, \$23,500, and placed it to his personal credit on the books of the Bottling Works. (R. 41.) In February 1937 one Blair, a certified public accountant, was instructed

by the decedent's counsel to set up separate trustee books. An audit was made from the books of the Bottling Works as explained by the company's bookkeeper, and after the entries were made up the decedent's counsel was consulted for his approval before the trustee books were opened. (R. 41.)

The Commissioner determined (R. 12-19), and the Tax Court held (R. 46-50), that the income from this trust for the years 1934 to 1937 was taxable to the decedent. The Circuit Court of Appeals affirmed. (R. 415.)²

ARGUMENT

1. This case does not present any particularly novel or important question in the application of the principles of *Helvering v. Clifford*, 309 U. S. 331, but is well within the doctrine of that case. While it is true that this was not a short term trust, the length of the term is but one of the factors to be considered in problems of this nature. *Helvering v. Stuart*, 317 U. S. 154. In a number

² Several other unrelated issues which were originally involved are no longer in the case: (a) Upon the question whether a distribution by the Bottling Works of stock in March Investment Corporation was taxable as a dividend in 1934, the Tax Court ruled against the Commissioner (R. 42-46), the Circuit Court of Appeals affirmed (R. 415), and the Government does not intend to seek certiorari; (b) upon the question whether the proceeds of the sale of certain American Tobacco Company stock were taxable to Weil personally, the Tax Court's ruling (R. 52-54) was not made the subject of appeal to the Circuit Court of Appeals.

of cases the *Clifford* doctrine has been held applicable despite the absence of the short term. *Downie v. Commissioner*, 133 F. 2d 899 (C. C. A. 6th); *White v. Higgins*, 116 F. 2d 312 (C. C. A. 1st); *Commissioner v. Buck*, 120 F. 2d 775 (C. C. A. 2d); *Commissioner v. Brown*, 122 F. 2d 800; 131 F. 2d 640 (C. C. A. 3d), certiorari denied, 318 U. S. 767; *Foerderer v. Commissioner*, 141 F. 2d 53 (C. C. A. 3d); *Williamson v. Commissioner*, 132 F. 2d 489 (C. C. A. 7th). Although the discretionary power of the trustee to apply the income and principal of the trust estate to the support and maintenance of the primary beneficiary prior to the amendment of the trust instrument in December, 1935, is not in itself determinative of the taxability of the trust income to the decedent since the amendment of Section 167 of the Internal Revenue Code by Section 134 of the Revenue Act of 1943, it is still a factor to be taken into account in determining whether, during the years 1934 and 1935, the grantor had retained such complete control of the trust as to leave him still in effect the owner of the income. S. Rep. No. 627, 78th Cong., 1st sess., pp. 68-69; H. Rep. No. 871, 78th Cong., 1st sess., p. 51. Here the creation of the trust in fact worked very little change in the decedent's relationship to his business or to his family either before or after the amendment of the trust instrument, and taxation of the trust income to him comports with the realities.

The decedent, as trustee, retained the same complete powers of management and investment of the trust property as he had had before, and it is highly significant that the corpus of the trust consisted of shares of stock in a business which was essentially a one-man affair conducted by him, in which he retained power to vote the stock and dispose of it in his sole discretion.³ No effective method of securing observance of the trust interest in the business was established. The decedent, moreover, continued his previous practice of loosely handling personal financial matters through the corporation, without adequate provision for safeguarding the trust estate. For example, he forthwith applied against his personal indebtedness the proceeds of a dividend in American Tobacco stock which had been distributed by the Bottling Works, although according to the records of the transactions relating to that stock he had received it as trustee. (R. 41-42.)

Not only did the creation of the trust work little change in the decedent's relationship to his business, but it was equally without substantial effect with respect to his control over his daughter's purse strings. The daughter was 15 years old at the time of the creation of the trust⁴ and

³ The *Stuart* case emphasizes the importance of this factor.

⁴ Since she was 22 on October 26, 1941 (R. 101), she was only 15 years old at the time the trust was created on December 24, 1934.

he retained the power to accumulate the income of the trust until she reached the age of 30. During that period she could receive the benefit only of so much of the income of the trust as the decedent decided to let her have, and no more. Although the power to change beneficiaries was not retained, the income remained within the "intimate family group" and the decedent controlled its use. Cf. *Commissioner v. Buck*, *supra*, and *Commissioner v. Brown*, *supra*.

As an added factor showing that the creation of the trust worked no substantial change in the decedent's position, the Tax Court pointed out (R. 49) that the trust came very close to being entirely without reality in that in practice very little regard was shown for its strict execution. See *Rands v. Commissioner*, 34 B. T. A. 1107, appeal dismissed, 101 F. 2d 1018 (C. C. A. 6th). In this connection it should be noted that the Tax Court did not rest its conclusion with respect to the loose administration of the trust solely upon the fact that improper use had been made of the daughter's funds (cf. Pet. 4, 7), but also upon the initial failure to set up a separate account for the trust (R. 40, 49). And while the decedent's illness in England was offered as an explanation for the improper transactions, no explanation was offered for the failure to establish a separate account for the trust upon its creation.

2. Conflict is alleged with *Commissioner v. Branch*, 114 F. 2d 985 (C. C. A. 1st); *Plimpton v. Commissioner*, 135 F. 2d 482 (C. C. A. 1st); *Phipps v. Commissioner*, 137 F. 2d 141 (C. C. A. 2d); *Commissioner v. Katz*, 139 F. 2d 107 (C. C. A. 7th); and *Armstrong v. Commissioner*, 143 F. 2d 700 (C. C. A. 10th). These cases, however, involve varying fact situations and in none of them are the facts significantly similar to those here presented. None of these cases holds that the length of term of the trust is the decisive consideration or that the income from a long term trust cannot be taxed to the grantor under Section 22 (a). As the cases cited on p. 12, *supra*, show, the First, Second and Seventh Circuits, as well as the Third and Sixth, have in proper cases held the *Clifford* doctrine applicable to long term trusts.

3. The memorandum opinion of the Circuit Court of Appeals does not disclose whether the court regarded the question here involved as one of fact, upon which the Tax Court's conclusion should be affirmed if supported by substantial evidence, or as one of law. If the latter, not only is the result below right as a matter of law, but there is no conflict with the decisions of other circuits, in view of the factual differences among the cases. In other circuit courts of appeals decisions (e. g., that in *Armstrong v. Commissioner*, *supra*) Tax Court decisions in cases of this type have occasionally been reversed upon the ground

that the question was one of law and had been wrongly decided. A conflict of rationale and a possible conflict of result may be said to exist between those cases and the present one, if the court below regarded the question as one of fact. This, however, is speculative. The Tax Court's conclusion is right, is amply supported by evidence, and was correctly affirmed by the court below. No significant conflict, if any at all, is present.

CONCLUSION

The judgment below is correct and there is no occasion for review by this Court. The petition should be denied.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

SAMUEL O. CLARK, Jr.,
Assistant Attorney General.

SEWALL KEY,
BERNARD CHERTCOFF,
Special Assistants to the Attorney General.

DECEMBER 1944.

